QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Burgess v State of Queensland (Office of Industrial Relations)* [2023] QIRC 077
PARTIES:	**Burgess, Helen** (Appellant) **v** **State of Queensland (Office of Industrial Relations)** (Respondent)
CASE NO:	PSA/2022/958
PROCEEDING:	Public Service Appeal - disciplinary decision
DELIVERED ON:	6 March 2023
MEMBER:	O'Connor VP
HEARD AT:	On the papers
ORDERS:	**1. That pursuant to s 562C(1)(a) of the *Industrial Relations Act* 2016 (Qld), the decision appealed against be confirmed.**
CATCHWORDS:	PUBLIC SERVICE - EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - public service appeal - where appeal against a disciplinary decision made pursuant to s 187 of the *Public Service Act* 2008 (Qld) - where allegation substantiated - where appellant disputing penalty imposed - where appellant seeking disciplinary action be set aside and no further action taken in relation to this matter - whether appellant followed due process - whether appellant denied procedural fairness - whether the decision was fair and reasonable - determined decision was fair and reasonable.

LEGISLATION:	*Industrial Relations Act* 2016 (Qld), s 562B, s 562C *Public Service Act* 2008 (Qld) s 187, s 188, s 194, s 197 Directive 14/20: Discipline, cl 8 Directive 02/21: Senior Officers - employment conditions Code of Conduct For the Queensland Public Service
CASES:	*Bragg v Secretary, Department of Employment Education and Training (Federal)* [1996] FCA 1536 *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 *Gilmour v Waddell & Ors* [2019] QSC 170 *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018) *King-Koi v Queensland (Department of Education)* [2020] QIRC 209 *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 195 ALR 502

Reasons for Decision

Introduction

[1] Ms Helen Burgess ('the Appellant') is employed by the Office of Industrial Relations, State of Queensland ('OIR')('the Department/the Respondent'). On 27 October 2022, the Appellant filed an appeal against a disciplinary decision pursuant to s 194(1)(b)(i) of the *Public Service Act* 2008 (Qld) ('the PS Act').[1]

[2] The Appellant has been employed by the Respondent (and its predecessors) since on or about 30 July 2007. She is currently employed as the Director, Construction Compliance and Field Services ('CCFS'), Work Health and Safety (WHS) Compliance and Field

[1] As from 1 March 2023 the *Public Sector Act* 2022 was enacted wherein Chapter 9, Repeal, savings and transitional provisions at Division 7, Reviews and appeals applies.

Services, OIR and commenced in that role on or about 19 September 2018. The Appellant submits that except for the matters the subject of this appeal, she has an unblemished work history with the Respondent during her fifteen years of service.

[3] The Appeal is filed against a decision of the Respondent dated 5 October 2022 to impose the disciplinary action of a deferment of any consideration of a remuneration increase for a period of 6 months from the date the disciplinary action is implemented and a reprimand.

[4] The Appellant seeks the disciplinary action should be set aside and that no further action taken in relation to this matter.

[5] The appeal is made pursuant to s 197 of the PS Act, which provides that an appeal under Ch. 7, Pt. 1 of the PS Act is to be heard and determined under Ch. 11 of the *Industrial Relations Act* 2016 ('the IR Act') by the Queensland Industrial Relations Commission.

[6] Section 562B(3) of the IR Act provides that the purpose of an appeal is to decide whether the decision appealed against was fair or reasonable. Accordingly, the issue for my determination in this appeal is whether the decision is fair and reasonable.

[7] The appeal must be decided by reviewing the decision appealed against. As the word "review" has no settled meaning it is necessary to take its meaning from the context in which it appears.[2] An appeal under Ch. 7, Pt. 1 of the PS Act is not a re-hearing but, rather, involves a review of the decision arrived at and the decision-making process associated with it.[3]

The decision

[8] By letter dated 26 August 2022, the decision maker determined pursuant to s 187(1)(g) of the PS Act the Appellant had contravened, without a reasonable excuse and in a way sufficiently serious to warrant disciplinary action, a relevant standard of conduct namely clauses 1.1, 2.1 and 4.1 of the Code of Conduct For the Queensland Public Service (Code of Conduct).[4] The following allegation against the Appellant was found to be substantiated:

Allegation one

[2] *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261, [31]. (Mason CJ, Brennan and Toohey JJ).
[3] *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018).
[4] Respondent's submissions filed 14 November 2022, [6].

On 6 July 2021, you failed to follow due process in respect to a complaint received from the Construction, Forestry, Maritime, Mining and Energy Union ('CFMEU') ('the Allegation').[5]

[9] On 5 October 2022, the decision maker imposed a disciplinary penalty pursuant to s 188(1) of the PS Act on the Appellant of:

- deferment of any consideration of a remuneration increase for a period of 6 months from the date the disciplinary action is implemented; and
- a reprimand.

Relevant legislation

[10] Section 187 of the PS Act provides for the grounds for discipline as follows:

> **187 Grounds for discipline**
>
> (1) A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has -
> (a) engaged in repeated unsatisfactory performance or serious under performance of the employee's duties, including, for example, by performing duties carelessly, incompetently or inefficiently; or
> (b) been guilty of misconduct; or
> (c) been absent from duty without approved leave and without reasonable excuse; or
> (d) contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or
> (e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee's duties; or
> (ea) contravened, without reasonable excuse, a requirement of the chief executive under
> *section 179A (1)* in relation to the employee's appointment, secondment or employment by, in response to the requirement -
> (i) failing to disclose a serious disciplinary action; or
> (ii) giving false or misleading information; or
> (f) contravened, without reasonable excuse, a provision of this Act; or
> (g) contravened, without reasonable excuse, a relevant standard of conduct in a way that is sufficiently serious to warrant disciplinary action.
> (2) A disciplinary ground arises when the act or omission constituting the ground is done or made.
> (3) Also, a chief executive may discipline, on the same grounds mentioned in *subsection (1)*-
> (a) a public service employee under section 187A; or
> (b) a former public service employee under section 188A .
> (4) In this section -
> ***misconduct*** means -

[5] Appeal Notice filed 27 October 2022, HB-3, p 11.

(a) inappropriate or improper conduct in an official capacity; or
(b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

Example of misconduct -
victimising another public service employee in the course of the other employee's employment in the public service

relevant standard of conduct, for a public service employee, means -
(a) a standard of conduct applying to the employee under an approved code of conduct under the *Public Sector Ethics Act 1994*; or
(b) a standard of conduct, if any, applying to the employee under an approved standard of practice under the *Public Sector Ethics Act 1994*.

responsible person, for a direction, means a person with authority to give the direction, whether the authority derives from this Act or otherwise.

[11] Section 188 of the PS Act identifies the disciplinary action that may be taken against a public service employee as follows:

188 Disciplinary action that may be taken against a public service employee

(1) In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (**disciplinary action**) that the chief executive considers reasonable in the circumstances.
Examples of disciplinary action -
- termination of employment
- reduction of classification level and a consequential change of duties
- transfer or redeployment to other public service employment
- forfeiture or deferment of a remuneration increment or increase
- reduction of remuneration level
- imposition of a monetary penalty
- if a penalty is imposed, a direction that the amount of the penalty be deducted from the employee's periodic remuneration payments
- a reprimand

(2) If the disciplinary action is taken following an agreement under section 187A (4) between the previous chief executive and the current chief executive mentioned in the section, the chief executives must agree on the disciplinary action.
(3) However, a monetary penalty cannot be more than the total of 2 of the employee's periodic remuneration payments.
(4) Also, an amount directed to be deducted from any particular periodic remuneration payment of the employee -
(a) must not be more than half of the amount payable to or for the employee in relation to the payment; and
(b) must not reduce the amount of salary payable to the employee in relation to the period to less than -
(i) if the employee has a dependant—the guaranteed minimum wage for each week of the period; or
(ii) otherwise - two-thirds of the guaranteed minimum wage for each week of the period.
(5) In acting under subsection (1), the chief executive must comply with this Act and any relevant directive of the commission chief executive.
(6) An order under subsection (1) is binding on anyone affected by it.

[12] Section 194 of the PS Act relevantly identifies the decisions against which appeals may be made as follows:

> **194 Decisions against which appeals may be made**
>
> (1) An appeal may be made against the following decisions -
> …
> (b) a decision under a disciplinary law to discipline -
> (i) a person (other than by termination of employment), including the action taken
> in disciplining the person; or
> …

[13] Directive 14/20: Discipline ('Discipline Directive')[6] came into effect on 25 September 2020. The purpose of the Discipline Directive, amongst other things, is to outline the process for managing disciplinary action under the PS Act.

[14] Clause 8.3 of the Discipline Directive relevantly provides the process that must be followed in commencing a show cause process for a disciplinary finding as follows:

> (a) The chief executive is to provide the employee with written details of each allegation and invite the employee to show cause why a disciplinary finding should not be made in relation to each allegation (a show cause notice on disciplinary finding):
>
> (b) Written details of each allegation in clause 8.3(a) must include:
> (i) the allegation
> (ii) the particulars of the facts considered by the chief executive for the allegation
> (iii) the disciplinary ground under section 187 of the PS Act that applies to the allegation.
>
> (c) A copy of all evidence relevant to the facts considered by the chief executive for each allegation in clause 8.3(a) must be provided to the employee, including, where relevant, specific reference to page or paragraph numbers that comprise the relevant evidence.
>
> (d) The chief executive must provide the employee with a minimum of 14 days from the date of receipt of a show cause notice on disciplinary finding to consider and respond to the notice, having regard to the volume of material and complexity of the matter. The chief executive may grant, and must consider any request for, an extension of time to respond to a show cause notice on disciplinary finding if there are reasonable grounds for extension.
>
> (e) If the employee does not respond to a show cause notice on disciplinary finding, or does not respond within the nominated timeframe in clause 8.3(d) and has not been granted an extension of time to respond, the chief executive may make a decision on grounds based on the information available to them.

[15] Clause 8.4 of the Discipline Directive provides for a decision on grounds as follows:

> (a) A chief executive must review all relevant material, including any submissions from the employee, and make a decision on the disciplinary finding on the balance of probabilities.

[6] Relevant at the time.

(b) The chief executive must advise the employee of the chief executive's finding in relation to each allegation included in the show cause notice on disciplinary finding.

(c) For each finding in clause 8.4(a) the chief executive must clearly explain their finding of fact on the balance of probabilities, including the evidence relied on to reach the finding, and state if the disciplinary ground to which the allegation was applied has been established.

(d) The employee is to be informed of the finding and explanation of the finding in writing, including information that the employee may appeal the disciplinary finding.

(e) If the chief executive determines that discipline ground/s have been established, the chief executive may consider whether disciplinary action should be proposed (clause 8.5) and/or management action implemented, or to take no further action.
If the chief executive determines that no ground/s for discipline have been established, the chief executive may consider whether any management action is required and advise the employee in writing.

[16] Clause 8.5 (d) of the Discipline Directive sets out the factors the chief executive should consider when proposing appropriate and proportionate disciplinary action. The considerations are as follows:

(i) the seriousness of the disciplinary finding
(ii) the employee's classification level and/or expected level of awareness about their performance or conduct obligations
(iii) whether extenuating or mitigating circumstances applied to the employee's actions
(iv) the employee's overall work record including previous management interventions and/or disciplinary proceedings
(v) the employee's explanation (if any)
(vi) the degree of risk to the health and safety of employees, customers and members of the public
(vii) the impact on the employee's ability to perform the duties of their position
(viii) the employee's potential for modified behaviour in the work unit or elsewhere
(ix) the impact a financial penalty may have on the employee
(x) the cumulative impact that a reduction in classification and/or pay-point may have on the employee
(xi) the likely impact the disciplinary action will have on public and customer confidence in the unit/agency and its proportionality to the gravity of the disciplinary finding.

[17] The Code of Conduct relevantly provides the following **Standards of conduct**:

1.1 Commit to the highest ethical standards

As public service employees we are required to ensure that our conduct meets the highest ethical standards when we are fulfilling our responsibilities.

We will:

a. ensure any advice that we provide is objective, independent, apolitical and impartial
b. ensure our decision making is ethical
c. engage with the community in a manner that is consultative, respectful and fair, and

d. meet our obligations to report suspected wrongdoing, including conduct not consistent with this Code.

2.1 Commit to excellence in service delivery

Public service agencies are entrusted with public funds to develop and deliver services to the community on behalf of government.
We have a responsibility to:

a. deliver services fairly, courteously, effectively, and ensure we use resources efficiently and economically
b. assist all members of the community, particularly people with disabilities, those who speak languages other than English, and those who may find it difficult to access government services, and
c. treat complaints from clients and the community seriously and respond to constructive feedback as an opportunity for improvement.

4.1 Ensure diligence in public administration

We have an obligation to seek to achieve high standards of public administration and perform our duties to the best of our abilities.
We will:

a. apply due care in our work, and provide accurate and impartial advice to all clients whether members of the public, public service agencies, or any level of government
b treat all people equitably and consistently, and demonstrate the principles of procedural fairness and natural justice when making decisions
c. exercise our lawful powers and authority with care and for the purpose for which these were granted, and
d. comply with all reasonable and lawful instructions, whether or not we personally agree with a given policy direction.

Whether the decision was fair and reasonable

[18] In determining whether the decision was fair and reasonable, consideration must be had to the allegation and the basis upon which the allegation was substantiated.

[19] The principles in considering whether a decision is 'unreasonable' were outlined by Ryan J in *Gilmour v Waddell & Ors*:[7]

> The focus of a review of the reasonableness, or unreasonableness, of a decision is on whether the decision is so unreasonable that it lacks intelligent justification in all of the relevant circumstances.
>
> The legal standard of unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power.

[7] [2019] QSC 170.

> A court considering an argument that a decision is unreasonable is not undertaking a merits review. If a decision may be reasonably justified, then it is not an unreasonable decision, even if a reviewing court might disagree with it.[8]

[20] Applying the principles outlined above and for the reasons which follow, I do not consider that the decision to substantiate allegation one lacks justification in the circumstances. The decision is, in my view, fair and reasonable.

Background

[21] The Appellant submits in the grounds of her appeal the events the subject of the disciplinary action under appeal occurred on 6 July 2021. A complaint was made by Mr J. Bleijie MP, State Member for Kawana to the Crime and Corruption Commission and subsequently referred to the OIR to investigate.

[22] On 2 August 2021 Mr P. Edwards, Director of Ethical Standards, OIR appointed Ashdale to independently investigate the complaint. The Appellant said she participated in investigation interviews on 29 September 2021 and 25 November 2021 and 18 interviews were conducted with witnesses or relevant officers. The main witness, Mr Beau Seiffert, a union official was not interviewed. The report was finalised on 14 January 2022.[9]

[23] The Appellant was sent the First Show Cause Notice dated 7 June 2022 seeking her response to the Allegation within 14 days. The Appellant responded on 4 July 2022 and denied engaging in the conduct.

[24] On 26 August 2022, the Respondent found the Allegation to be substantiated and made disciplinary findings against the Appellant (the Second Show Cause Notice).

[25] The Appellant responded to the Second Show Cause Notice on 13 September 2022. The disciplinary action was imposed on 5 October 2022.

Appellant's submissions

[26] The Appellant advances three arguments in relation to the decision to find the disciplinary grounds:

(a) the Respondent failed to afford the Appellant natural justice;
(b) most of the alleged allegations cited in the Liability Notice were not substantiated by the decision maker and the alleged substantiated allegations were not sufficiently serious to warrant disciplinary action; and

[8] *Gilmour v Waddell & Ors* [207]-[209].
[9] Appellant's grounds for appeal, p 5, [1]-[4].

(c) the decision to impose a disciplinary penalty was not fair and reasonable in all of the circumstances.[10]

[27] In her submissions the Appellant claims the main witness in the matter was not interviewed by the investigator. She states the allegations put to her were based on assumptions that could have been clarified had the main witness been interviewed.[11]

[28] Further, the Respondent failed to fully consider her arguments and appears to have 'gone over and above to ensure that all arguments advanced by the Appellant were disputed' in terms of the decision to impose a disciplinary penalty.[12]

[29] The Appellant submits that within the First Show Cause Notice many extremely serious allegations were put to her. In the Second Show Cause Notice the Respondent substantiated only the following three allegations:

(a) failed to make a record of a complaint that had been received by the Appellant from a CFMEU official because it had been sent to her private phone;
(b) failed to follow due process by not forwarding the photographs and complaint made by the CFMEU official to Assessment and Advisory Services (AAA) to be triaged and allocated; and
(c) did not ensure that the matter was treated and recorded as being 'reactive' rather than a 'proactive' assessment.[13]

[30] In the view of the Appellant the substantiated allegations could be fairly described as the result of human error. The Appellant states the events the subject of the substantiated allegations are not described in the Event Management Policy (Policy)[14] and she therefore did not breach the Policy at all. The Appellant submits she followed what she understood to be the correct process as adopted by her peers without any consequence.[15]

[31] The Appellant states the disciplinary decision was not fair and reasonable as most of the allegations put to her were not substantiated, and the substantiated allegation does not warrant disciplinary action. The decision to impose a penalty was harsh and there was no basis to impose a penalty arising from human error.[16]

[32] The effect of the disciplinary decision is merely an extension of a deferment already imposed which will detrimentally affect her superannuation entitlements. The Appellant is being paid as a SO1 while her peers are being paid as a SO3 and she has effectively

[10] Appellant's submissions filed 7 November 2022, [8]; 'Liability Notice' referred to is the 'First Show Cause Notice'.
[11] Appellant's submissions filed 7 November 2022, [9].
[12] Ibid, [10].
[13] Ibid 2022, [12].
[14] Event Management Version 9.5, Date of effect 17/01/2019, Last Updated 01/09/2021.
[15] Appellant's submissions filed 7 November 2022, [13].
[16] Ibid, [15]-[17].

been paid two pay points below what she should have been since her appointment on 19 September 2018.[17]

[33] The Appellant claims the disciplinary penalty is neither fair nor reasonable and should be set aside.[18]

Respondent's submissions

[34] The Respondent submits it was reasonably open to make the disciplinary findings in respect of Allegation 1 for the following reasons:

(a) Ms Burgess accepts that on 6 July 2021 she received a text message on her personal mobile phone from Beau Seiffert, Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU) which consisted of five photographs. The five photographs depicted the top of a jump form (a system of formwork and working platforms) at a construction site at 152 Wharf Street, Spring Hill (Site). At the time, the Site was being managed by Morris Property Group, who had hired SEQ Formwork and Hire (SEQ Formwork) as subcontractors at the Site. Ms Burgess also accepts she then forwarded the text message from Mr Seiffert from her personal mobile phone to Mark Houston's (Operations Manager, OIR) personal mobile phone.

(b) In response to the First Show Cause Notice, Ms Burgess did not dispute that it is standard process when OIR receives complaints with respect to workplace, health and safety (WHS) matters, for the complaints to be sent to Assessment and Advisory Services (AAA) to be triaged and allocated. Ms Burgess did not dispute that she did not refer the message from Mr Seiffert to AAA.

(c) However, Ms Burgess denied the text messages from Mr Seiffert constituted a 'complaint' from the CFMEU regarding the jump form at the site and said Mr Seiffert was raising a 'general concern' regarding the competence of inspectors. Mr James considered this explanation was inconsistent with Ms Burgess' characterisation in her interview with the investigator that she *'was told prior to getting the photo that there was, this was on a particular site and it was non-compliant formwork and they'd send me the photo'*. Mr Houston's evidence, and Ms Burgess' response to the First Show Cause Notice was that after discussing the photos, she and Mr Houston *'decided to ask ... the only former formworker in the inspectorate, to look at the formwork and see if it was as it appeared in the photos*', were also consistent with the matter being a complaint specifically with respect to SEQ Formwork at the Site. It was reasonably open to Mr James to determine the text messages from Mr Seiffert constituted a complaint from the CFMEU regarding SEQ Formwork at the Site.

(d) In light of Mr James' finding the matter constituted a complaint from the CFMEU regarding SEQ Formwork at the Site, Mr James was satisfied Ms Burgess was required to refer the matter to AAA for triage and allocation and failed to do so.

(e) Ms Burgess agreed '*in theory*' that inspections arising from complaints received by OIR must be treated as 'reactive' assessments, and all other matters where no complaint is received

[17] Appellant's submissions filed 7 November 2022, [20], [22].
[18] Ibid, [26]-[27].

must be treated as 'proactive' assessments, but said this was not the reality in practice. Mr James did not consider Ms Burgess' allegations that other OIR employees may not always treat inspections arising from complaints as reactive meant there is not a requirement to do so. Ms Burgess is a senior employee and it is incumbent upon her to set an example for other employees and support them to carry out their duties in accordance with relevant policies and procedures.

(f) In circumstances where Ms Burgess was aware the inspector's attendance at the Site was in response to the complaint from Mr Seiffert, Mr James considered it was incumbent upon her to ensure the inspection was treated as reactive and Ms Burgess failed to do so by failing to refer the matter to AAA and failing to provide Mr Houston with adequate information to enable him to facilitate a reactive assessment.

(g) Ms Burgess submits her conduct was the result of 'human error'. As set out in the Second Show Cause Notice, even if Mr James accepted Ms Burgess' claim she 'misclassified' the complaint because she understood it to be a 'general concern' regarding the competence of inspectors, it remains that Mr Seiffert was raising a work-related concern on behalf of the CFMEU and it should have appropriately been forwarded to AAA/Ms Burgess' work phone/email to create an official record of the matter, managed through the triage and allocation process and treated as a reactive assessment.

(h) Ms Burgess said she did not recall whether she deleted the text message sent from her personal mobile phone to Mr Houston's personal mobile phone, as well as the original text message she received from Mr Seiffert containing the five photographs, but in any event, she no longer has the text messages because she no longer has the same phone handset. Ms Burgess did not dispute that the messages were work-related, and that she did not forward the messages to AAA and/or her OIR issued mobile phone or email. While Mr James determined to give Ms Burgess the benefit of the doubt with respect to the aspect of the allegation that she had deleted the messages, Mr James found it was highly inappropriate for her to fail to forward the messages to AAA and/or her OIR issued mobile phone or email so that OIR could keep proper records in relation to the matter.[19]

[35] After consideration of the evidence and response of the Appellant, the Respondent determined it was fair and reasonable to find the Allegation substantiated on the basis of the following findings that the Appellant:

- failed to make a record of the complaint from the CFMEU where it had been sent to her personal mobile phone, and therefore prevented OIR from keeping proper records of official information;

- failed to follow due process by not forwarding the message from Mr Seiffert to AAA for triage and allocation; and

- failed to ensure the matter was treated and recorded as being a 'reactive' assessment rather than a 'proactive' assessment, resulting in the CFMEU not being identified as the complainant.[20]

[19] Respondent's submissions filed 14 November 2022, [9].
[20] Ibid, [10].

[36] The conduct of the Appellant was a significant and serious departure from standard procedures regarding the management of complaints. As a Director, CCFS the Appellant is a senior employee who manages the operations of CCFS and working with internal and external stakeholders. This may have an adverse effect on public confidence and more importantly the confidence of OIR's stakeholders in OIR conducting operations in a transparent manner in accordance with due process.[21]

[37] The Respondent submits that the Appellant's conduct had the capacity to contribute to a public perception OIR was treating SEQ Formwork unfairly at the request of the CFMEU.[22]

[38] The Appellant's claim that she followed what she understood to be the correct process is inconsistent with her responses during the investigation and disciplinary process. Clearly she was aware of the standard process applicable for managing complaints and failed to follow such process.[23]

[39] In acknowledging the impact of the disciplinary action on the Appellant, the Respondent submits that after considering the nature and seriousness of the substantiated allegation, the disciplinary action is not disproportionate and is fair and reasonable. The Respondent requires employees to act in accordance with due process and conduct operations in a transparent manner.[24]

[40] The deferment of a remuneration increase for a period of six months is towards the lower end of the scale and any financial impact on the Appellant will be limited to that time. Also, a reprimand does not mean the Appellant will not be eligible for consideration for a pay point increase at the end of the period of deferment.[25]

[41] The Respondent submits that the Appellant's reference to a restructure of the operational arrangements of the CCFS team is not relevant to the disciplinary process pursuant to s 188 of the PS Act. Further, the Appellant's claim in relation to her pay point and any previous consideration of a pay point increase are separate matters and also are not relevant to the disciplinary process.[26]

[42] In response to the Appellant's claim she was not afforded procedural fairness as Mr Seiffert was not interviewed by the investigator, the Respondent states the First Show Cause Notice was issued on the basis of the investigation report. No disciplinary findings were made until the Respondent considered the Appellant's response wherein she admits she received the text message on her personal mobile phone from Mr Seiffert. Further,

[21] Respondent's submissions filed 14 November 2022, [11]-[12].
[22] Ibid, [12].
[23] Ibid, [13].
[24] Ibid, [15].
[25] Ibid, [15(b)].
[26] Ibid, [17], [18].

the Appellant and Mr Houston provided consistent evidence to the investigator regarding the content of the text message and it was fair and reasonable for the Respondent to find the allegation substantiated notwithstanding that Mr Seiffert was not interviewed by the investigator.[27]

[43] In her reply submissions concerning the use of her personal phone, the Appellant explained that she accidentally sent the photographs to Mr Houston's personal phone and that she had made a 'human error'.[28]

[44] The Appellant submits that as the complaint made to her was about inspectors, 'she did not think the matter needed to be dealt with in accordance with the triage and allocation processes for complaints about workplace health and safety at a worksite'. She concedes that if this misclassification was an error, it was a human error and not serious enough to justify a disciplinary penalty.[29]

[45] The Appellant refers to the Staff Update sent by Mr Andrew Harris, Executive Director of Compliance and Field Services dated 7 November 2022 outlining expectations in relation to the correct application of the Policy. In her view the Staff Update is inconsistent with Annexure B of the Policy and in those circumstances it is obvious why the Appellant's human errors occurred. The Appellant mistakenly believed at the time that the complaint she received fell into one of the excluded categories.[30]

[46] In reference to the Respondent saying the Appellant had been the subject officer of investigations about her conduct since February 2019, the Appellant agrees that none of the prior investigations resulted in any allegations being substantiated. For more than three years the Appellant states she has been subjected to ongoing investigations and audits causing considerable distress particularly when some extremely sensitive and private allegations were made public despite her entitlement to confidentiality.[31]

Consideration

[47] The Appellant seeks an order that the disciplinary action should be set aside, and no further action taken in relation to the matter.

a. the Applicant was denied procedural fairness due to:

i. Mr James' unwillingness to properly consider the matters that the applicant raised in response to the Penalty Notice;
ii. the failure of the investigation to interview key witnesses, including Mr Seiffert; and

[27] Respondent's submissions filed 14 November 2022, [22].
[28] Appellant's reply submissions filed 21 November 2022, [3].
[29] Ibid, [5].
[30] Ibid, [6], [8].
[31] Ibid, [20]-[21].

iii. her not being given any notice or any opportunity to be heard about the local management disciplinary action by Mr Harris for an allegation that was not substantiated;

b. the imposition of the disciplinary penalty amounting to disproportionate treatment because the applicant's peers had engaged in exactly the same conduct with no action other than local management action being taken;

c. the policy that Mr James referred to did not outline a process that dealt with the issue at hand, which therefore meant that the applicant did not breach the policy as was alleged;

d. the applicant has already been financially penalised as a result of the process by being underpaid for her role for at least three years and was refused a remuneration increase until it was finalised;

e. the disciplinary penalty that was imposed was manifestly excessive and disproportionate to the conduct of the applicant;

f. Mr James made unfair comments about the applicant's expression of remorse and commitment to follow requirements in the future. The applicant was in a position where if she hadn't expressed remorse she would have been penalised and was ultimately penalised for expressing remorse. Mr James' approach is counterintuitive and his criticism is evidence of an unwillingness to give any consideration to the mitigating matters that were raised by the applicant; and

g. the purpose of punishment had already been achieved in that the applicant had expressed remorse and communicated her willingness to avoid a reoccurrence of the human error upon receiving clarification of the expectations. That having occurred, there was no further deterrence needed such that might warrant further punishment. The applicant's submission is fortified by the subsequent conduct by Mr Harris on 26 October 2022, which is the exact disciplinary outcome the applicant proposed within her response to the Penalty Notice.

[48] In the High Court case of *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* ('Lam')[32] Gleeson CJ in discussing the way that procedural fairness cases are approached by the Courts wrote the following:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[33]

[49] Let me briefly deal with the identified grounds where it is said that the Appellant was denied procedural fairness.

[50] It is contended by the Appellant that Mr James was unwilling to consider the matters that the Appellant raised in response to the Penalty Notice. The nature of this 'unwillingness' on the part of Mr James is not articulated. From the material before the Commission, I am not persuaded by the view that the Appellant was denied procedural fairness.

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[32] (2003) 195 ALR 502.
[33] *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 195 ALR 502, [37].

[51] I consider that the Appellant was provided procedural fairness during the entire show cause process. The Respondent placed the Appellant on notice in writing with respect to the allegations, including the particulars relied on in support of the allegations. The Respondent provided the Appellant with an opportunity to respond to the allegations and to make submissions in respect of penalty.

[52] The Appellant submits that she was not afforded procedural fairness as Mr Seiffert was not interviewed by the investigator, and the 'allegations put to the Appellant were based on assumptions that could have easily been clarified if the main witness (referring to Mr Seiffert) had been interviewed'.

[53] Relevant for the purposes of the disciplinary findings are the following: the Appellant accepts that on 6 July 2021, she received a text message on her personal mobile phone from Mr Seiffert which consisted of five photographs. The five photographs depicted the top of a jump form (a system of formwork and working platforms) at a construction site at Spring Hill; the Appellant accepted that she forwarded the text message from Mr Seiffert from her personal mobile phone to Mark Houston's (Operations Manager, OIR) personal mobile phone; the Appellant does not dispute that she did not refer the messages from Mr Seiffert to AAA; and the Appellant denied the text messages from Mr Seiffert constituted a 'complaint' from the CFMEU regarding the jump form at the site but rather, Mr Seiffert was raising a 'general concern' regarding the competence of inspectors.

[54] In circumstances where the Appellant accepts that she received the text message on her personal mobile phone from Mr Seiffert, and that both the Appellant and Mr Houston gave consistent evidence to the investigator regarding the content of the text message, it was fair and reasonable for Mr James to find the Allegation substantiated notwithstanding that Mr Seiffert was not interviewed by the investigator.

[55] It is submitted by the Respondent that:

> On consideration of Ms Burgess' response to the First Show Cause Notice, Mr James gave Ms Burgess the benefit of the doubt with respect to some aspects of the Allegation about which Mr Seiffert may have been able to give evidence.[34]

[56] Further, the Respondent submits:

> However, Ms Burgess denied the text messages from Mr Seiffert constituted a 'complaint' from the CFMEU regarding the jump form at the site and said Mr Seiffert was raising a 'general concern' regarding the competence of inspectors. Mr James considered this explanation was inconsistent with Ms Burgess' characterisation in her interview with the investigator that she 'was told prior to getting the photo that there was, this was on a particular site and it was non-compliant formwork and they'd send me the photo'. Mr Houston's evidence, and Ms Burgess' response to the First Show Cause Notice was that after discussing the photos, she, and Mr Houston 'decided to ask … the only former form worker in the inspectorate, to look at the formwork and see if it was as it appeared in

[34] Respondent's submissions filed 14 November 2022, [22].

> the photos', were also consistent with the matter being a complaint specifically with respect to SEQ Formwork at the Site.[35]

[57] I do not accept the argument that the Appellant was denied procedural fairness by reason of the decision not to interview key witnesses, in particular Mr Seiffert. On the material before the decision maker, it was reasonably open to him to determine that the text messages from Mr Seiffert constituted a complaint from the CFMEU regarding SEQ Formwork at the Site.

[58] In the Notice of Appeal, the Appellant argues that the verbal direction on 26 October 2022, and written direction on 27 October 2022 from Andrew Harris (Executive Director, WHS Compliance and Field Services) amount to 'local management disciplinary action' imposed for an allegation that was not substantiated. The Respondent asserts that Mr Harris' direction to the Appellant not to use her personal phone for work purposes was management action in response to concerns identified through the investigation and disciplinary process that OIR stakeholders were sending work-related communications to the Appellant's personal mobile phone.

[59] Mr Harris' email needs to be seen in light of the factual background leading to the substantiation of allegation 1. Mr Harris was reminding the Appellant not to use her personal mobile for work purposes. To assist in complying with the direction, Mr Harris proffered some practical advice. It is clear to me that the direction given by Mr Harris was not disciplinary action.

[60] It is submitted by the Appellant that the disciplinary penalty amounted to disproportionate treatment because the Appellant's peers had engaged in the same conduct with no action other than management action being imposed. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. There is no evidence before the Commission to enable a proper determination as to whether or not there has been disproportionate treatment.

[61] It was asserted by the Appellant that Mr James made 'unfair comments' about the Appellant's expression of remorse. In the letter of 5 October 2022 dealing with the Decision on Disciplinary Action, Mr James wrote:

> I am concerned that your response appears to minimise the seriousness of your conduct, including by characterising it as a "human error" and a "misclassification" (which, as set above, I do not accept) arising from systemic practices adopted by you and other senior employees.[36]

[62] Mr James expressed a concern that the Appellant's response did not demonstrate a 'genuine insight into your conduct'. However, he goes on to note:

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[35] Respondent's submissions filed 14 November 2022, [9(c)].
[36] Appeal notice filed 27 October 2022, Attachment HB-5, p 5.

> ...I am encouraged by your submissions that you are committed to abiding by the expectations of you as Director, CCFS, going forward and that the conduct will not occur again.[37]

[63] The Appellant submits that she has already suffered financial a significant penalty and that no further financial penalty should be imposed. The Respondent submits that the approval of a pay-point increase or any application for a pay-point increase outside of the disciplinary action, are separate matters and are not relevant to the current disciplinary proceedings. The Respondent submits that pursuant to Directive 02/21: Senior Officers - employment conditions, consideration of a pay-point increase is tied to achieving and exceeding agreed performance objectives. The approval of a recommended pay-point increase is a matter for the Chief Executive if there is evidence of sustained high performance.

[64] The imposition of a Reprimand under s 188 of the PS Act is the lowest of disciplinary sanctions that can be imposed. I also note the submissions of the Respondent that the imposition of a Reprimand does not have the effect that the Appellant will not be eligible for consideration for a pay-point increase at the end of the period of deferment.

[65] The disciplinary penalties as imposed are not harsh or disproportionate, considering the senior position held by the Appellant; and the standard of behaviour expected in her role as a Director, CCFS, which is to role model desired behaviours to staff within the OIR.

[66] It must be remembered that the rationale for the disciplinary scheme in the PS Act is underpinned by a recognition that the Appellant is both an employee and a public service employee; and is justifiable by the need to protect the reputation of the public service; and securing the mode of administering intra-service discipline itself, which is efficient, equitable and proper. [38]

Conclusion

[67] By s 562B of the IR Act the appeal must be decided by the Commission reviewing the decision appealed against and the purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.[39]

[68] The appeal is not by way of rehearing but involves a review of the decision arrived at and the associated decision-making process.[40]

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[37] Appeal notice filed 27 October 2022, Attachment HB-5, p 6.
[38] *Bragg v Secretary, Department of Employment Education and Training (Federal)* [1996] FCA 1536 (7 June 1996).
[39] *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252, [60] to [61] (Byrne SJA) as to the former, equivalent provisions in s 201 of the *Public Service Act 2008*.
[40] *King-Koi v Queensland (Department of Education)* [2020] QIRC 209.

[69] I do not consider that the matters raised by the Appellant under the grounds of appeal render the decision or the decision-making process as not fair and reasonable.

[70] For the reasons advanced above, I have formed the view that the decision, the subject of the appeal before the Commission, was fair and reasonable.

Order

1. **That pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against be confirmed.**